82-1165

NO. 82-

IN THE

Supreme Court of the United States

October Term, 1982

JAMES H. CORDER and HARRY W. WESTERN, on Behalf of Themselves and all Others Similarly Situated,

Petitioners,

vs.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County; et al., etc.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

William Oliver Kirk, Jr.*
P.O. Box A-B
Carrollton, AL 35447
(205) 367-8125
CURRY & KIRK
ATTORNEYS AT LAW

**Counsel of Record*

QUESTIONS PRESENTED

Whether Section 2 of the Voting Rights Act, 42 U.S.C. §1973 is included within the scope of the Fifteenth Amendment to the United States Constitution and was considered by the Court of Appeals?

PARTIES BELOW

The following were parties below:

Plaintiffs-appellants:

James H. Corder and Harry W. Western, on behalf of themselves and all others similarly situated;

Defendants-appellees:

Robert H. Kirksey, Individually and as Probate Judge of Pickens County; H. Hope Wheat, Individually and as Circuit Clerk and Register of Pickens County; Louie C. Coleman, Individually and as Sheriff of Pickens County, Aubrey Turnipseed, Travis Fair, Groce Pratt and Richard Walters, Individually and as the County Commissioners of Pickens County; Billie F. McCool, T. B. Woodard, Jr., J. L. Stone, Marvin Elmore, and J. V. Park, individually and as members of the Pickens County Board of Education.

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TABLE OF AUTHORITIES

OPINIONS BELOW

Accepted as reported in petition.

JURISDICTION

The Court has jurisdiction to review the opinion below pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 2 of the Voting Rights Act 42 U.S.C. §1973. Appended hereto at Page 8a.

Section 1 of the Fifteenth Amendment to the United States Constitution. Appended hereto at Page 1a.

STATEMENT OF THE CASE

No additional Statement of the Case is being made except the following which is made to correct inaccuracies or omissions in the Statement of the Case made by the Petitioner.

Section 2 of the Voting Rights Act, 42 U.S.C. §1973 has been included in the pleadings and has been before the Court of Appeals and the District Court since the case was originally filed in 1973 and no violation of said statute was ever found.

The District Court did review this case in light of the City of Mobile v. Bolden 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47.

SUMMARY OF ARGUMENT

The decision below was in accordance with the body of law dealing with voting rights' violations and voter dilution cases and all points of law under the Fifteenth Amendment to the United States Constitution and under Section 2 of the Voting Rights Act, 42 U.S.C. §1973 have been covered by the Courts below. There is no question of law at issue that justifies this Writ of Certiorari being granted.

ARGUMENT

The only claim of Petitioners as a reason for granting Certiorari is that the Court of Appeals did not review the record in light of Section 2 of the Voting Rights Act, 42 U.S.C. §1973. This claim is clearly erroneous. The Petitioner admits that they have claimed violation of Section 2 of the Voting Rights Act, 8a, and have presented it to the Courts below from the beginning. Said claim has been rejected by the Court at every step.

The Court of Appeals issued its opinion of March 16, 1981, and said in part: The District Court found that there was simply no facts in the record probative of racially discriminatory intent. James H. Corder, et al v. Robert H. Kirksey, et al, 639 F.2d 1195.

The Court of Appeals remanded this case back to the District Court for review in light of the City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47, with further instructions to entertain any application that the Plaintiffs may care to make to present further evidence on the claim that at-large method of elections of the Pickens County Commissioners were unconstitutional. Plaintiffs declined the Court's invitation to present further evidence. Order of District Court, September 24, 1980. Appended hereto at page 2a. The District Court said in that order that there was no evidence before the Court on which to draw inference that the election scheme dilutes the voting strength of blacks.

This Court said in City of Mobile v. Bolden, supra, that Section 2 of the Voting Rights Act, 8a, added nothing to the

claim under the Fifteenth Amendment to the U. S. Constitution, la. This Court further stated that it is apparent that the language of Section 2 of the Voting Rights Act does no more than elaborate upon that of the Fifteenth Amendment and that the sparse legislative history of Section 2 makes it clear that it was intended to have an effect that is no different from that of the Fifteenth Amendment itself. The view that Section 2 of the Voting Rights Act simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings and it was stated that Section 2 was almost a rephrasing of the Fifteenth Amendment.

Section 2 of the Voting Rights Act, 42 U.S.C. §1973, has been before the Court below since the original complaint was filed

in 1973.

Therefore, Section 2 of the Voting Rights Act, 42 U.S.C. §1973, has been fully considered by the Court of Appeals and the District Court and found to be complied with by the Respondents and there is nothing further for this Court to consider.

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain the burden of establishing that there are any special and important reasons why the Writ should be granted. The decision below did not involve an important question of federal law which has not already been settled by this Court; nor has the Court of Appeals decided a federal question in a way that conflicts with applicable decisions of another Court of Appeals on the same manner. The Court of Appeals correctly held that the trial court's finding of facts and conclusions of law pertaining to the legislative enacted at-large scheme for election of Pickens County Commissioners did pass constitutional muster.

This Court should deny the Writ of Certiorari.

Respectfully submitted,

William Oliver Kirk, Jr.*
P. O. Box A-B
Carrollton, AL 35447
CURRY & KIRK
ATTORNEYS AT LAW

Counsel for Respondents
Robert H. Kirksey, Ind.
and as Probate Judge of
Pickens County and
Commissioners of Pickens
County, et al.

* Counsel of Record

Section 1 of the Fifteenth Amendment provides:

> The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA WESTERN DIVISION

JAMES H. CORDER and HARRY W. WESTERN, on behalf of themselves and all others similarly situated,

PLAINTIFFS

V.

ROBERT H. KIRKSEY, ind. and as Probate Judge of Pickens County, et al.,

DEFENDANTS

C.A. 73-M-1086

[September 24, 1980]

ORDER

This case has again been remanded by the Fifth Circuit "to enable the district court to reexamine the evidence and its findings in the light of City of Mobile, Ala. v. Bolden, [446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980)], and to entertain any application plaintiffs may

care to make to present further evidence on their claim that the at-large method of electing the county commissioners is unconstitutional."

Plaintiffs have declined the court's invitation to present further evidence.

Plaintiffs' attack on the present voting scheme was on the at-large election of members of the county commission nominated from discrete equally apportioned districts on the ground that this diluted the voting strength of blacks in contravention of the Fourteenth and Fifteenth Amendments to the United States Constitution. The court held in its last opinion that this had not been proved. There the court said: ".... there is no evidence before the court on which to drawn inferences that the election scheme dilutes the voting strength of blacks or

that the scheme was designed to discriminate against blacks." (Emphasis supplied.) The court is still of this opinion. Dilution is not now a test under City of Mobile, supra. The Supreme Court held that racially discriminatory motivation is necessary to sustain a claim under either the Fourteenth or Fifteenth Amendments.

> The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See Ex parte Yarbrough, 110 U.S. 651, 665; Neal v. Delaware, 103 U.S. 370, 389-390; United States v. Cruikshank, 92 U.S. 542, 555-556; United States v. Reese, 92 U.S. 214. The Amendment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon anyone," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race,

color, or previous condition of servitude." Id., at 217-218.

> Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose . . . .

100 S.Ct. 1497.

The test is substantially the same with respect to the Fourteenth Amendment equal protection claim.

> Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional per se, e.g., White v. Regester, 412 U.S. 755; Whitcomb v. Chavis, 403 U.S. 124; Kilgarin v. Hill, 386 U.S. 120; Burns v. Richardson, 384 U.S. 73; Fortson v. Dorsey, 379 U.S. 433. We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See White v. Regester, supra; Whitcomb v. Chavis, supra, Burns v. Richardson, supra; Fortson v. Dorsey, supra. To prove such a purpose it is not

> enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. White v. Regester, supra, at 765-766; Whitcomb v. Chavis, supra, at 149-150. A plaintiff must prove that the disputed plan was "conceived or operated as (a) purposeful device () to further racial discrimination," id., at 149.
>
> This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment.

100 S.Ct. 1499.

As the court originally found and here reiterates, there is no evidence that the election scheme was designed to discriminate against blacks.

Accordingly, the court is still of the opinion that the challenge on the County Commission as it is presently constituted has not been sustained.

Done this 24th day of September, 1980.

S/FRANK H. McFADDEN
CHIEF JUDGE

Section 2 of the Voting Rights Act, 42 USC §1973:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United State to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f) (2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election are not equally open to participation by members of a class of citizens protected by subsection (a) in

that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.